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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

YOUTH FOR ENVIRONMENTAL JUSTICE et al., Plaintiffs, Cross-defendants and Appellants, v. CITY OF LOS ANGELES et al., Cross-defendants and Appellants; CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, Intervenor and Respondent.	B282822 (Los Angeles County Super. Ct. No. BC600373

APPEAL from orders of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed.

Gupta Wessler, Deepak Gupta, Daniel Townsend; Kassia Rhoades Siegel, Maya Danielle Golden-Krasner; Shana D. G. Lazerow; Peiffer Wolf Carr & Kane and Adam Brett Wolf, for Plaintiffs, Cross-defendants and Appellants Youth for Environmental Justice, Center for Biological Diversity and South Central Youth Leadership Coalition.

Michael N. Feuer, City Attorney, Terry Kaufmann Macias, Senior Assistant City Attorney, Amy Brothers, Jennifer K. Tobkin and Patrick J. Hagan, Deputy City Attorneys, for Cross-defendants and Appellants City of Los Angeles, City of Los Angeles Department of City Planning and Michael J. LoGrande.

Alston & Bird, Jeffrey D. Dintzer, Matt Wickersham and Nathaniel Johnson, for Intervenor and Respondent.

After three nonprofit environmental and social justice organizations sued the City of Los Angeles (the City) for allegedly permitting oil drilling in violation of environmental and civil rights laws, an oil industry trade group intervened in the case. Without the participation of the intervenor, the City and nonprofits settled the case and the City adopted policies to address the nonprofits' concerns. We consider whether there is any merit to the oil industry group's contention—specifically, the merit necessary to survive a special motion to strike under Code of Civil Procedure section 425.16[1]—that the conduct of the City and nonprofits infringed the group's due process right to block the settlement and compel a decision on the merits of the case.

I. BACKGROUND

A. Nonprofits Sue the City

In November 2015, Youth for Environmental Justice, South Central Youth Leadership Coalition, and the Center for Biological Diversity (collectively hereafter, Nonprofits) sued the City, its Department of City Planning (the DCP), and the DCP's director (collectively hereafter, the City). Nonprofits alleged in their verified complaint and petition for writ of mandate that the

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[1] Familiarly known as the anti-SLAPP ("strategic lawsuit against public participation") statute, Code of Civil Procedure section 425.16 allows the trial court to dismiss a claim arising from protected activity (as defined in the statute) unless the plaintiff can establish a probability of prevailing on the merits of that claim. (Code Civ. Proc., § 425.16, subd. (b)(1); *Baral v. Schnitt* (2016) 1 Cal.5th 376, 381 & fn. 1 (*Baral*).) Undesignated statutory references that follow are to the Code of Civil Procedure.

City was not complying with its responsibilities under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and state antidiscrimination law (Gov. Code, § 11135 et seq.) by "rubber stamping" oil drilling applications without considering environmental, health, and safety impacts and by imposing less protective conditions on drilling in majority Latino and African-American communities than in predominantly white neighborhoods. Nonprofits sought declaratory and injunctive relief, as well as a peremptory writ directing the City to comply with CEQA and civil rights law by making appropriate investigations and determinations of environmental, health, and environmental justice factors in the course of making decisions on oil drilling applications.

The California Independent Petroleum Association (CIPA), a nonprofit trade association representing oil producers, royalty owners, and service providers, moved to intervene in Nonprofits' lawsuit "for the purpose of responding to and defending against [Nonprofits'] Complaint . . . ." CIPA asserted that approximately 27 of its oil producer members and 1,700 royalty owners could be adversely affected by the outcome of Nonprofits' litigation. The City and Nonprofits opposed CIPA's motion to intervene.

In the spring of 2016, Nonprofits and the City stipulated to stay the litigation in order to explore settlement. At their request, the trial court scheduled a mandatory settlement conference for late June. CIPA was not yet a party to the case, and the trial court denied its ex parte application to continue the settlement conference until the court resolved CIPA's motion to

intervene.[2] Nonprofits and the City participated in the June settlement conference as scheduled.

After a hearing in mid-July 2016, the trial court granted CIPA's motion to intervene, as a matter of permission rather than by right. The court stated it was "not going to limit [CIPA's] intervention" and CIPA could participate in the next settlement conference, which was scheduled for late September. In light of the possibility of settlement, the court stayed proceedings in the case until mid-October. While proceedings were stayed, CIPA propounded discovery requests seeking disclosure of settlement communications between Nonprofits and the City for the asserted purpose of preparing for the September settlement conference (which was later continued to November). The City and Nonprofits balked, and the trial court scheduled a mid-October hearing to consider CIPA's motion to compel the requested communications.

B. CIPA Cross-Complains against Nonprofits and the City, and the City Settles the Suit Brought by the Nonprofits

On September 26, 2016, CIPA filed a cross-complaint against the City and Nonprofits. CIPA alleged the City and Nonprofits had "used the stay to prohibit CIPA from taking discovery and defend[ing] against this lawsuit, all while secretly negotiating some settlement agreement without even advising

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[2] Even though CIPA initially moved to intervene in December 2015, the Nonprofits' case was moved between different divisions and judges in the first part of 2016, which delayed consideration of CIPA's motion.

CIPA that an agreement ha[d] been reached." CIPA said it learned the City Attorney's Office had been presenting the settlement agreement—which CIPA had yet to see—to City committees in closed sessions pending presentation of the agreement to the City Council in two days. CIPA alleged that as a party to Nonprofits' lawsuit with interests that would be prejudiced by a settlement, it was "entitled to object to the settlement and receive a decision on the merits of the case." CIPA asked the trial court to "issue a declaratory judgment stating the settlement agreement between [Nonprofits] and the City is unconstitutional and void by undermining CIPA's due process right to a decision on the merits" under the Fourteenth Amendment. CIPA also asked the court to enjoin the City from enforcing any new policies or rules resulting from the settlement. CIPA further reserved the right to amend its cross-complaint after learning the terms of the settlement agreement.

On the same day it filed its cross-complaint, CIPA filed an ex parte application to lift the stay in the proceedings. At a hearing on CIPA's application to lift the stay (which the City and Nonprofits did not oppose), the trial court asked Nonprofits whether a settlement had been reached and their answer was "[t]he case is not settled." The trial court granted CIPA's application to lift the stay.

Two days later, on September 28, 2016, the City Council and Mayor approved a settlement agreement between the City and Nonprofits. The City Council approved the agreement in open session. No one from CIPA spoke in opposition to the settlement.

C. The Settlement Agreement

The City provided CIPA a copy of the settlement agreement shortly after it had been approved. The recitals to the agreement described Nonprofits' complaint against the City and stated that on September 19, 2016, "the DCP issued Zoning Administrator Memorandum No. 133 [(hereafter, Memorandum 133)] . . . establishing a new set of procedures and policies for the acceptance and processing of applications for oil drilling approvals pursuant to Los Angeles Municipal Code . . . Section 13.01-H . . . ." In the operative portion of the agreement, Nonprofits agreed to dismiss their lawsuit with prejudice—which they did—and the City agreed to pay Nonprofits $230,000 toward costs and attorney fees.

D. CIPA Files a First Amended Cross-Complaint

In early October 2016, the City and Nonprofits removed CIPA's existing cross-complaint to federal court because CIPA was asserting claims under the Fourteenth Amendment to the United States Constitution. CIPA then filed a first amended cross-complaint (the operative cross-complaint) alleging violations of due process solely under the California Constitution and expressly excluding the assertion of any federal claims. In light of CIPA's amendments, the matter was remanded to state court.

In the operative cross-complaint, CIPA again accused the City and Nonprofits of settling Nonprofits' claims pursuant to a "strategy" of "secret[ ]" and collusive negotiations "that they knew would materially impact CIPA without getting any input . . . from CIPA or its members." CIPA also alleged the City and Nonprofits cooperatively engaged in procedural tactics designed to thwart

CIPA from obtaining discovery or participating in settlement negotiations. CIPA further alleged the City instituted new "regulations for conditional use approvals for existing and new oil-extraction operations," and those regulations, based on CIPA's information and belief, "were promulgated pursuant to the settlement agreement . . . ." The operative cross-complaint asserted the level of environmental review that would be required by the new "regulations" was "unknown," but maintained that the review would be unnecessary and burdensome.

Echoing its original cross-complaint, the operative cross-complaint maintained CIPA was "entitled to object to the settlement and receive a decision on the merits of the case." CIPA asked the trial court to declare the settlement agreement void, to enjoin the City and Nonprofits "from enforcing" its terms "as to CIPA," and to declare and enjoin as unenforceable any policies, rules, or practices the City adopted "as a consequence of the settlement with [Nonprofits]."

E. Memorandum 133

Memorandum 133, which was issued by the Chief Zoning Administrator of the City's Office of Zoning Administration, provides it "is intended to establish a comprehensive set of procedures and policies for the acceptance and processing of applications for oil drilling approvals pursuant to Los Angeles Municipal Code . . . Section 13.01-H and to establish City guidelines for . . . CEQA . . . review of Section 13.01-H oil drilling applications." The memorandum acknowledges the City formerly allowed "applicants . . . to apply for modifications to the original conditions for oil drilling approvals though the use of a more

limited review process,"[3] but—with an exception described *post*—supplants those former procedures for approval under Section 13.01-H, including approvals to modify existing permit conditions.

Pursuant to the procedures promulgated in Memorandum 133, all applications for oil drilling approval must be accompanied by an environmental assessment form and are subject to a public hearing. If the Zoning Administrator determines the proposed project is categorically exempt under CEQA,[4] he or she shall provide notice of a public hearing and a 35-day public comment period. Based on information received during that period, the Zoning Administrator may decide an exemption applies, require the applicant to submit additional

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[3] Zoning Administrator Memoranda Nos. 94 and 94A (hereafter Memoranda 94 and 94A), which were issued in 1994 and 2000 respectively, allowed existing permitholders to seek to modify previously approved conditions by submitting an "Approval of Plans" application form, a letter detailing the requested modification, documentation depicting the site of the proposed operation, mailing address labels for abutting property owners, and a filing fee. Memoranda 94 and 94A acknowledged that under the Los Angeles Municipal Code, applicants for modifications of existing conditions could be required to submit "a full new filing request for a determination of conditions." But Memoranda 94 and 94A allowed modifications to be sought through this more circumscribed plan approval process in light of "the abbreviated nature" of modification requests and the fact that such requests related to "a previously approved site."

[4] The memorandum states applications to drill, re-drill, deepen, or convert a well are not eligible for categorical exemption.

information, or require the applicant to submit an "Initial Study" prepared by a duly qualified environmental consultant.

As specified in Memorandum 133, and after reviewing the Initial Study, the Zoning Administrator may prepare a "Negative Declaration" (finding no or insignificant environmental impact), prepare a "Mitigated Negative Declaration" (an insignificant environmental impact if mitigation measures are undertaken), or require the applicant to prepare a full "Environmental Impact Report" (EIR). The Zoning Administrator must hold a public hearing before adopting a Negative Declaration or Mitigated Negative Declaration. And an EIR, and potentially certain Initial Studies, must include a "Health Impact Assessment" regarding potential health effects of the project on the community.

Memorandum 133 provides for a single exception to the procedures it otherwise requires. If an existing permit "mandates a procedure [for modification of previously approved conditions] that is inconsistent with [Memorandum 133], the Zoning Administrator shall consider whether a Plan Approval process shall be initiated by the City to revise any conditions to protect the public health, safety and welfare, including any condition establishing a process inconsistent with the purpose of this Memorandum. . . . [I]f an existing condition or provision is not modified through a Plan Approval, then the process outlined in the existing approval shall be followed." Memorandum 133 adds that its provisions are not "intended to expand the authority the City has to initiate a Plan Approval."

F. The City and Nonprofits File Anti-SLAPP Motions

The City filed a special motion to strike CIPA's operative cross-complaint under section 425.16. The City contended CIPA's

claims for relief were based on litigation activity protected by the anti-SLAPP statute—namely, the City's decision to settle Nonprofits' lawsuit and the City's litigation conduct prior to settlement. The City further contended CIPA had no probability of prevailing on its due process causes of action because it could not show the settlement agreement impaired a protected property interest or a statutorily conferred benefit.

Nonprofits filed their own special motion to strike CIPA's operative cross-complaint under section 425.16 and joined in the City's motion. Nonprofits contended CIPA's claims arose from their engagement in settlement negotiations, execution of a settlement agreement, and/or dismissal of claims against the City—all of which Nonprofits asserted were protected activity under the anti-SLAPP statute. Nonprofits further contended CIPA had no probability of prevailing against them because Nonprofits were not state actors subject to liability under the California Constitution's due process clause and because, in any event, CIPA had not been deprived of a legally cognizable property interest and had been given all of the process it was due.

Following the filing of the anti-SLAPP motions, CIPA asked the trial court to permit CIPA to take "specified discovery." (§ 425.16, subd. (g).)[5] CIPA contended depositions and production of documents were necessary to establish Memorandum 133 was "the basis for the settlement between [Nonprofits] and the City." Nonprofits and the City opposed CIPA's discovery motion.

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[5] Discovery is ordinarily stayed when a defendant files a section 425.16 special motion to strike, but the trial court "may order that specified discovery be conducted" upon "noticed motion" and a showing of "good cause." (§ 425.16, subd. (g).)

The trial court held three contested hearings on CIPA's discovery motion and ultimately denied the motion once Nonprofits and the City agreed to a factual stipulation. That stipulation reads as follows: "1. Solely for purposes of resolving whether [CIPA] can make a *prima facie* case that its due process rights have been violated, for purposes of adjudicating the pending Motion for Specified Discovery and City and [Nonprofits'] pending Special Motions to Strike, the facts set forth below shall be deemed true: [¶] a. The City instituted [Memorandum 133], which changed the City's policy with respect to the City's review and processing of oil and gas drilling approvals, as part of and pursuant to the settlement agreement between itself and [Nonprofits]. [¶] b. The City's issuance of [Memorandum 133] formed the basis for the settlement agreement between the City and [Nonprofits]. [¶] 2. In agreeing to the foregoing, the City and [Nonprofits] do not waive their ability to contest the veracity of the above-referenced 'facts,' if the anti-SLAPP motions are denied and discovery commences. [¶] 3. In agreeing to these terms, the City and [Nonprofits] do not waive or otherwise limit any rights other than those described above."

Relying on the stipulation extracted from the City and Nonprofits, CIPA's opposition to the anti-SLAPP motions argued the claims asserted in the operative cross-complaint arose not from any protected settlement conduct but from the implementation of Memorandum 133—which CIPA asserted was not protected activity. CIPA further contended that even if its claims were deemed to arise from protected activity, the anti-SLAPP motions should be denied because CIPA had made the requisite "probability of prevailing" showing, i.e., that the settlement infringed the property rights of CIPA's members.

As to this latter argument concerning the probability of prevailing on the operative cross-complaint, CIPA submitted declarations from its CEO; the president of the National Association of Royalty Owners-California, Inc.; an individual owner of mineral rights; a representative of a CIPA-member environmental consulting company; Christine Halley (Halley), an executive employed by CIPA member Sentinel Peak Resources California LLC; and Louis Zylstra (Zylstra), an executive employed by CIPA member E&B Natural Resources Management Corporation. The gist of the declarants' statements was that CIPA members had a property interest "in continued oil production" and Memorandum 133 would significantly injure that interest by increasing the costs and time necessary to engage in oil production operations.

In particular, CIPA's declarants focused on how Memorandum 133 would impact two categories of activities: (a) re-drilling, deepening, or converting existing wells, and (b) modifying previously approved permit conditions. The declarants asserted Memorandum 133 would require applicants to submit an Initial Study or EIR when seeking to re-drill, deepen, or convert existing wells even though the City previously issued categorical exemptions with respect to those activities.[6] The declarants also maintained that the City had previously treated

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[6] At the time Memorandum 133 issued, the fee for a categorical exemption was $81. (Former L.A. Mun. Code, § 19.05.) The fee for an Initial Study leading to a Negative Declaration or Mitigated Negative Declaration was $2,280, and fees for EIRs started at $7,156, with increases based on the size of the area involved and the degree of fire hazard. (Former L.A. Mun. Code, § 19.05.)

modifications of existing conditions as categorically exempt, which Memorandum 133 would no longer allow. Two of the declarants—Halley and Zylstra—specifically averred their companies held permits obligating the City to follow less stringent modification procedures than those imposed by Memorandum 133.

As for the cross-claims asserted against Nonprofits, CIPA argued they along with the City could be held liable for constitutional violations—despite their private status—because their ability to enforce the settlement was tantamount to an ability to enforce Memorandum 133. CIPA further asserted the Nonprofits could be considered state actors because their lawsuit against the City "activat[ed] the state judiciary to force the City to settle on terms that injure the property rights of CIPA's members . . . ."

At a hearing held on the anti-SLAPP motions, the trial court ruled in CIPA's favor. The court believed the basis of CIPA's cross-complaint was not settlement negotiations but the "implementation of a government regulation," which was "clearly not protected by [section 425.16]." The court further thought CIPA carried its burden to demonstrate a probability of prevailing on its due process claims because the submitted declarations indicated Memorandum 133 affected CIPA members' "existing rights . . . ." The court further believed Nonprofits, and not just the City, were subject to liability for the asserted due process violations because the stipulation between the City and Nonprofits was proof their conduct was "intertwined."

More than three months after the trial court decided the anti-SLAPP motions, and nearly two months after the City and Nonprofits filed their notices of appeal, the court filed a written

ruling elaborating on the reasons it had given for its anti-SLAPP ruling.[7] The court stated CIPA's claims were based on "the implementation and enforcement of the settlement agreement, specifically of [Memorandum 133]," and "[g]overnmental actions, as such, do not implicate the exercise of free speech or petition." The court wrote that even though CIPA's exclusion from settlement negotiations may have triggered its cross-complaint, the basis of CIPA's lawsuit was not the negotiations themselves but rather their effect—as the court put it, that the City and Nonprofits "adjudicated the rights of . . . CIPA and created a regulatory rule ex nihilo." The court further stated that even if CIPA's due process claims arose from protected activity, it established a probability of prevailing based on evidence

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[7] The trial judge told the parties he would issue a written decision during the hearing on the anti-SLAPP motions—as well as at a subsequent hearing at which he addressed certain evidentiary rulings and a proposed order (which the parties disputed). Because the judge's written decision was filed only after designation of the appellate record, the parties variously ask us to augment the record with it (CIPA), take judicial notice of it (CIPA, Nonprofits), or disregard it entirely (City). Although the issuance of a post-appeal explanatory ruling is not something we condone as a general practice, we agree to take judicial notice of the belated ruling in this case. It does not "amend . . . a judgment to substantially modify it or materially alter the rights of the parties" (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 782); it does not consist of disputed evidentiary facts that were not "part of the record at the time the judgment was entered" (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813); and it is a court record subject to judicial notice (*ibid.*, citing Evid. Code, § 452, subd. (d)(1)).

Memorandum 133 altered CIPA members' existing property rights. And the court claimed Nonprofits could be held liable as state actors because Nonprofits were "the reason [Memorandum 133] exists, and they may enforce its implementation by the City as a part of the settlement agreement."

II. DISCUSSION

Resolution of this appeal boils down to three questions. One, is CIPA's operative cross-complaint based on protected activity under section 425.16? Two, can Nonprofits be treated as state actors for the purpose of imposing due process liability? And three, has CIPA established a legally and factually sufficient claim that Memorandum 133 infringed its members' legitimate property interests (which is necessary to proceed on a minimally viable due process claim)? As we explain, the answers are "yes," "no," and "no," respectively, and we shall therefore reverse.

Because the claims alleged in the operative cross-complaint overwhelmingly strike at the conduct of the City and Nonprofits in settling litigation—rather than the issuance or content of Memorandum 133—CIPA's due process claims arise from protected activity. And CIPA has not established those claims have the requisite "minimal merit" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*)) to withstand anti-SLAPP scrutiny. There is no prospect of showing Nonprofits are state actors on the record before us because they do not have the authority to compel state action—i.e., the authority to enforce Memorandum 133—and they are not so intertwined with City policy that they can fairly be subject to government due process obligations. As for the City, the mere fact that Memorandum 133 may and likely will burden CIPA members' future oil operations does not

establish a protected property interest sufficient to claim a due process violation. Rather, Memorandum 133 seeks to guide discretionary decisions that the Los Angeles Municipal Code empowers the City to make, and the memorandum does not injure any protected property rights of CIPA members.

A. Review of Anti-SLAPP Motions

Anti-SLAPP analysis proceeds in two steps. "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. . . . If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral*, *supra*, 1 Cal.5th at p. 396; see also *Navellier*, *supra*, 29 Cal.4th at pp. 88-89 [to show a probability of prevailing, "'the plaintiff "must demonstrate that the [challenged claim] is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment"'"].)

When evaluating a plaintiff's probability of prevailing, we "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We accept a plaintiff's evidentiary submissions as true—provided the evidence would be admissible at trial (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337,

1346)—and consider the moving defendant's evidence "'"only to determine if it has defeated that submitted by the plaintiff as a matter of law."' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis*).)

Before striking a claim under section 425.16, a court must be convinced both steps of anti-SLAPP analysis have been satisfied. (*Navellier*, *supra*, 29 Cal.4th at p. 89.) Put conversely, a trial court may deny a special motion to strike under two circumstances: if it determines (a) the challenged claim does not arise from protected activity, or (b) the challenged claim arises from protected activity but the plaintiff has established a probability it will prevail on the merits of that claim. (§ 425.16, subd. (b)(1).)

We review an order denying an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

B. CIPA's Due Process Claims Arise from Protected Activity

A claim is based on protected activity for purposes of applying the first prong of the anti-SLAPP statute when protected activity "form[s] the basis for liability"—i.e., provides "the elements of the challenged claim . . . ." (*Park*, *supra*, 2 Cal.5th at p. 1063.) We therefore begin by examining CIPA's claims of legal liability, taking care to distinguish "between activities that form the basis for a claim[, which are the proper touchstone of protected activity analysis,] and those that merely lead to the liability-creating activity or provide evidentiary support for the claim[, which are not]." (*Id.* at p. 1064.)

The operative cross-complaint alleges causes of action for declaratory and injunctive relief based on asserted violations of CIPA's due process rights under the California Constitution.[8] CIPA alleges it had a "fundamental right to be heard" in Nonprofits' lawsuit and the City and Nonprofits violated that right by "secretly" settling Nonprofits' claims in a collusive act.

CIPA specifically complains that beginning in the spring of 2016, after it moved to intervene, Nonprofits and the City "consistently circumvented CIPA's fundamental right to be heard" by: initiating settlement negotiations without notifying CIPA; "agree[ing] in March 2016 to transfer courtrooms with absolutely no notice to CIPA, even though its intervention motion had been on calendar for three months and was set for hearing in two weeks"; making "frivolous objections" to CIPA's motion to intervene; refusing to provide settlement communications to CIPA after it was made a party to the action with a right to participate in negotiations; preventing CIPA from taking discovery; and executing a settlement without notifying CIPA.

After describing these offending acts, CIPA alleges it is "entitled to object to the settlement and receive a decision on the merits of the case" because its interests "[a]s a party to [Nonprofits'] lawsuit . . . would undoubtedly be prejudiced by the settlement . . . ." The operative cross-complaint does not describe any provisions of Memorandum 133 other than to state the memorandum comprises "new regulations for conditional use plan approvals for existing and new oil-extraction operations"

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[8] Article I, section 7, subdivision (a) of the California Constitution prohibits the state from depriving a person "of life, liberty, or property without due process of law . . . ."

that "require unnecessary and burdensome environmental review . . . ." CIPA concedes in the operative cross-complaint that the extent of such environmental review is "unknown . . . ."

The City and Nonprofits contend CIPA's due process claims arise from their litigation conduct—specifically, their opposition to CIPA's requests for intervention and discovery, their engagement in settlement negotiations, and their decision to execute a settlement. Our examination of the operative cross-complaint convinces us the City and Nonprofits are correct, and application of settled law reveals such activity is protected under section 425.16.

The anti-SLAPP statute defines the categories of activity that are protected. (§ 425.16, subd. (e).) Included in these categories are the two that are pertinent here: "any written or oral statement or writing made before a . . . judicial proceeding" and "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subds. (e)(1), (e)(2).)

"[A] statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.) Here, the court filings and arguments made by the City and Nonprofits qualify as activity protected by section 425.16, subdivision (e)(1) (i.e., statements made before a judicial proceeding), and the negotiations and execution of a settlement between those parties are encompassed within the scope of section 425.16, subdivision (e)(2) (i.e., statements in connection with an issue under judicial review). (*Navellier*, *supra*, 29 Cal.4th at p. 90 [defendant's "negotiation and execution

of" a release of litigation claims fell within scope of section 425.16, subdivision (e)(2) and "his arguments [in court] respecting the [r]elease's validity" were protected under section 425.16, subdivision (e)(1)]; see also *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-964 [content and conduct of settlement negotiations are generally protected activity for anti-SLAPP purposes].)

CIPA contends its due process claims are based not on the "underlying settlement *per se*" but rather on "the implementation of [Memorandum 133] by the City pursuant to its decision to settle [Nonprofits' claims] in a case where CIPA is a party." (See *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 353-357 [government act that is not itself an exercise of free speech or petition is not protected under the anti-SLAPP statute simply because it follows a vote or discussion]; see also *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1211 [government act alleged to have violated competitive bidding laws was not in furtherance of free speech or petition].) But that is an argument entirely divorced from what the operative cross-complaint actually says. The document itself summarizes the basis of its claims and requests for relief as follows: "Because CIPA objects to the settlement agreement, any settlement agreement between [Nonprofits] and the City would violate CIPA's due process right under the California Constitution to have a decision on the merits in the aforementioned litigation, and would be unenforceable as to CIPA thereby rendering any settlement meaningless. [¶] . . . To avoid the unnecessary waste of judicial resources required by a later collateral attack from CIPA, CIPA requests by this Cross-

Complaint that the Court declare the settlement agreement between [Nonprofits] and the City void as a violation of CIPA's due process right to a decision on the merits and further enjoin [Nonprofits] and the City from enforcing the terms of the settlement as to CIPA." Noticeably absent from CIPA's summary—and from the operative cross-complaint generally—are direct attacks on Memorandum 133. To the extent the cross-complaint does address the new policy measure, it characterizes it as a condition of the settlement agreement and seeks to void it on that basis alone—in order "[t]o avoid . . . a later collateral attack . . . ."

CIPA's position with regard to prong one is also belied by two other aspects of its cross-complaint: CIPA's decision to name Nonprofits as defendants and CIPA's reliance on its intervenor status. If the basis of CIPA's claims were limited to the implementation of Memorandum 133, CIPA would have no reason to sue Nonprofits.[9] (See *Dunn-Edwards Corp. v. South Coast Air Quality Management District* (1993) 19 Cal.App.4th 536, 546 [where paint companies' grievance lay with the promulgation of environmental regulations, its causes of action were properly brought against the regulators rather than a private third party] (*Dunn-Edwards*).) Further, by describing its right to due process as a right to block the settlement and continue litigating Nonprofits' case, CIPA reveals that its challenge is to the litigation process, not its outcome. Even though CIPA asked the trial court to enjoin Memorandum 133, it

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[9] As we explain in further detail *post*, we reject the contention that Nonprofits could contractually compel the City to enforce Memorandum 133.

did so not on the ground that Memorandum 133 itself was unlawful but that it was a term of a settlement reached in violation of CIPA's procedural rights as an intervenor. The Court of Appeal's observation in *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793 at page 811 is therefore equally apt here: "Almost all of the 'specific acts of alleged wrongdoing' in the [operative cross-]complaint are litigation activities." CIPA is stuck with its operative cross-complaint as drafted, and as drafted, its due process claim arises from gripes about the litigation process, i.e., protected activity.

C. CIPA Has No Probability of Prevailing against Nonprofits

Because the obligations of the due process clause are restricted to government actors, "[o]nly those actions that may fairly be attributed to the state . . . are subject to [its] protections." (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1112.) Here, CIPA does not present a legally sufficient claim that Nonprofits' conduct was """so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action"" [Citation.]" (*Anchor Pacifica Management Co. v. Green* (2012) 205 Cal.App.4th 232, 239 (*Anchor*); see also *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 295 ["state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that

seemingly private behavior 'may be fairly treated as that of the State itself'"] (*Brentwood*).)[10]

CIPA acknowledges—rightly (see *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1034 & fn. 14)—that a party's mere resort to the courts to enforce a private settlement agreement does not transform that party into a state actor. But CIPA believes Nonprofits could be legally liable on a due process theory because their ability to enforce the settlement agreement entitles them to compel government action—namely, the implementation of Memorandum 133. We are not persuaded.

Neither the terms of the settlement agreement nor the stipulation entitles Nonprofits to compel implementation of Memorandum 133. To the contrary, both Nonprofits and the City represented to the trial court that Nonprofits have no right to enforce that directive and the City may revoke it at any time.[11]

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[10] Because "of the virtually identical language of the federal and state guarantees [of due process]," our Supreme Court has "looked to the United States Supreme Court's precedents for guidance in interpreting the contours of our own due process clause and ha[s] treated the state clause's prescriptions as substantially overlapping those of the federal Constitution." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*); see also *Anchor*, *supra*, 205 Cal.App.4th at pp. 242-245 [looking to *Brentwood* to determine whether party should be treated as state actor under both federal and state due process clauses].)

[11] That representation appears consistent with existing law. (See *108 Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 196-197 [where settlement agreement and stipulated judgment between city and third party did not grant third party "veto power" or otherwise restrict city's future

Furthermore, because the City's oil drilling policies entail "the exercise of [its] police power" and the City has no authority to "contract away its right to exercise the police power in the future," the settlement agreement "would be invalid and unenforceable as contrary to public policy" if it in fact enabled Nonprofits to compel implementation of Memorandum 133. (*Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 800 (*Avco*), superseded by statute on another ground as stated in *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1559, fn. 5; see also *108 Holdings*, *supra*, 136 Cal.App.4th at p. 196 ["Reservation of the police power is implicit in all government contracts and private parties take their rights subject to that reservation"].)

CIPA advances no other theory that would permit holding Nonprofits liable as state actors, and we have found no other basis on which such liability could be had. The United States Supreme Court in *Brentwood* enumerated a number of circumstances that might justify treating a nominally private entity as a state actor: where the entity acts in response to the "State's exercise of 'coercive power'"; "when the State provides 'significant encouragement, either overt or covert'"; "when a private actor operates as a 'willful participant in joint activity with the State, or its agents'"; when the private actor "is

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legislative activity, city did not unlawfully cede its police power] (*108 Holdings*); cf. *Dunn-Edwards*, *supra*, 19 Cal.App.4th at p. 545 [pollution control districts did not delegate their rulemaking authority to nonpublic entity where districts adopted rules developed by that entity in accordance with notice and hearing requirements].)

controlled by an 'agency of the State'"; when the private actor "is 'entwined with governmental policies'"; and "when government is 'entwined in [the private actor's] management or control . . . .'" (*Brentwood*, *supra*, 531 U.S. at p. 296, citations omitted.) Thus, on the facts in *Brentwood*, a state interscholastic athletic association was deemed to be a state actor where the association's membership was overwhelmingly comprised of public schools, its management consisted largely of state and public school officials, and its staff were given certain state employee benefits. (*Id*. at pp. 299-300.) No such overlap of membership or management exists between Nonprofits and the City.

Nor does the record suggest the City coerced or controlled Nonprofits in any respect—or vice versa. (See *Anchor*, *supra*, 205 Cal.App.4th at p. 244 [property management company deemed to be state actor with respect to operation of government-subsidized housing where management company "had little discretion" and "was subject to City oversight and approval"].) Despite the reference to collusion in its operative cross-complaint, CIPA acknowledged in the trial court that the City and Nonprofits were bona fide adversaries. The City's demurrer to Nonprofits' civil rights claim and motion to strike other portions of the complaint bear this out. The fact that those parties reached a settlement, or took consistent actions during the litigation vis-à-vis CIPA, does not confer on Nonprofits an imprimatur of governmental authority. "Mere approval of or acquiescence in the initiatives of a private party [by the government] is not sufficient to justify" treating the private party as a state actor. (*Blum v. Yaretsky* (1982) 457 U.S. 991, 1004-1005.)

D. CIPA Has Not Established a Probability of Prevailing Against the City

1. Property rights subject to due process protection in the permit context

In order for one party to a lawsuit to establish other parties violated its due process rights by settling the action, the complaining party must show that the settled litigation affected its protected rights. (See *Today's Fresh Start*, *supra*, 57 Cal.4th at p. 214 ["'The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty"'"]; see also *Firefighters v. Cleveland* (1986) 478 U.S. 501, 529 [intervenor has the right to litigate "valid claims" it has "properly raised," which other parties to the litigation may not dispose of through settlement]; *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 328, 334, 338 [where teachers association was an indispensable defendant in a lawsuit regarding layoff decisions that potentially affected association members' contractual and statutory seniority rights, the association had a right to a decision on the merits of the action].) "Due process rights stem from any legitimate claim of entitlement created from an existing understanding which emanates from a source independent of the Constitution; such a source need not be purely statutory, but may be embodied in other forms." (*Bush v. California Conservation Corps* (1982) 136 Cal.App.3d 194, 200; see also *Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"] (*Roth*).)

"A benefit is not a protected property interest under the due process clause if the decision maker has the discretion to grant or deny the benefit." (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 853.) Accordingly, a permit applicant generally has no property interest in the future issuance of the permit applied for unless approval of the activity sought is mandatory.[12] (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224 [plaintiff had no right to obtain conditional use permit where the city council had discretion to review, condition, and deny such permits]; *Smith*, *supra*, 211 Cal.App.3d at p. 197 ["a conditional use permit . . . is, by definition, discretionary"]; *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 736 [compliance with zoning laws and building codes did not entitle plaintiff to building permit where municipal agency "was empowered to exercise discretionary review and to determine that the proposed . . . development was unsuitable for the indicated location"]; cf. *Roth*, *supra*, 408 U.S. at p. 577 [entitlement is not created merely because a person has "a unilateral expectation of it"]; *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551 ["A zoning ordinance or land-use regulation which operates prospectively, and denies the owner the opportunity to exploit an interest in the property that the

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[12] "Zoning laws regulate land uses in two basic ways: while some uses are permitted as a matter of right, other sensitive uses require discretionary administrative approval . . . pursuant to criteria specified in the zoning ordinance. (Govt. Code, § 65901.) Such criteria are designed to evaluate whether the discretionary use is compatible with the proposed location." (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197 (*Smith*).)

owner believed would be available for future development, or diminishes the value of the property, is not invalid and does not bring about a compensable taking unless all beneficial use of the property is denied"] (*Hansen Brothers*).)

Under certain circumstances, however, a municipal rule or regulation "may confer a property interest in [that] benefit if it imposes particularized standards or criteria that significantly constrain the discretion of the city with respect to that benefit." (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 169-170 (*Brown*).) A rule significantly constrains a decisionmaker's discretion if either of two things are true—"if it sets out conditions under which the benefit must be granted or if it sets out the only conditions under which the benefit may be denied." (*Ibid.*, citing *Allen v. City of Beverly Hills* (9th Cir. 1990) 911 F.2d 367, 370 ["Whether an expectation of entitlement is sufficient to create a property interest 'will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [decisionmaker]'"] (*Allen*).)

Once the government issues a permit—even in the exercise of discretion—the permittee may acquire a protected property interest in the permitted conduct pursuant to the vested rights doctrine, which "'is predicated upon estoppel of the governing body . . . .'" (*Avco*, *supra*, 17 Cal.3d at p. 793, citation omitted.) In conformance with that doctrine, "[i]t has long been the rule in this state . . . that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete [the work] in accordance with the terms of the permit." (*Id.* at p. 791; see also *Traverso v. People ex rel. Dept. of Transportation* (1993) 6 Cal.4th 1152, 1162 ["Once a permit has

been issued, its continued possession becomes a significant factor in the [permittee's] legitimate pursuit of a livelihood" and the government may not revoke the permit "without affording the procedural due process required by the Constitution"]; *Golden State Homebuilding Associates v. City of Modesto* (1994) 26 Cal.App.4th 601, 607 [under vested rights doctrine, a "right generally has been held to arise . . . upon issuance of a . . . final discretionary approval, and is limited in scope to the terms of the permit itself"]; *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158 [where permittee "has incurred material expense, he acquires a vested property right to the protection of which he is entitled," but no such right exists where "permittee does nothing beyond obtaining the permit"]; *Anderson v. City Council of Pleasant Hill* (1964) 229 Cal.App.2d 79, 88-89 ["property owner acquires a vested right to continue a use 'actually instituted,' not to capitalize upon anticipated profit"].)

2. City regulation of oil drilling

To determine whether Memorandum 133 impairs vested property rights of CIPA members,[13] we first consider the City's

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[13] Even though we conclude CIPA's due process claims are based on the City and Nonprofits' conduct in settling litigation—and that CIPA does not directly challenge Memorandum 133—we consider whether Memorandum 133 implicates the property rights of CIPA's members because the stipulation between the City and Nonprofits provides—for purposes of applying the second prong of the anti-SLAPP analysis—that Memorandum 133 was issued "as part of and pursuant to the settlement agreement . . . ." The content of the stipulation did not (and could not) alter or amend the operative cross-complaint.

authority to regulate oil drilling operations. In interpreting our state constitution or a city charter or ordinance, we apply a de novo standard of review. (*San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 740; *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 558.)

The California Constitution empowers counties and cities to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) The City's exercise of police power extends to approving, regulating, and prohibiting oil drilling within its boundaries. (*Hansen Brothers*, *supra*, 12 Cal.4th at p. 553 ["In general, the state has the same power to prohibit the extraction or removal of natural products from the land as it does to prohibit other uses"]; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 558 [cities may legitimately regulate and prohibit oil wells within city limits so long as they do not use "unreasonable means" to do so]; see also 59 Ops.Cal.Atty.Gen. 461 (1976).)

Article V, section 561 of the Los Angeles City Charter establishes within the DCP a "quasi-judicial agency known as the Office of Zoning Administration." The duties of the Office of Zoning Administration are carried out by Zoning Administrators, who "investigate and determine all applications for variances from any of the regulations and requirements of the zoning ordinances, and [exercise] other powers and duties with respect to zoning and land use as prescribed by ordinance." (L.A. Charter, art. V, § 561.) "The Chief Zoning Administrator may adopt rules necessary to carry out the requirements prescribed by

ordinance and which are not in conflict or inconsistent with those ordinances." (L.A. Charter, art. V. § 561.)

Section 13.01 of the Los Angeles Municipal Code (hereafter City Code) provides for the establishment and regulation of "oil drilling districts" in the City. "Any person desiring to drill, deepen or maintain an oil well in [a previously established] oil drilling district . . . shall file an application in the [DCP] . . . requesting a determination of the conditions under which the operations may be conducted." (L.A. Mun. Code, § 13.01-H.) Requests to convert existing wells from one class to another are subject to the same application process. (L.A. Mun. Code, § 13.01-I.) If a Zoning Administrator approves an application, he or she "shall determine and prescribe additional conditions or limitations, not in conflict with those specified in the ordinance establishing the district, which he or she deems appropriate in order to give effect to the provisions of this section and to other provisions of this chapter relating to zoning." (L.A. Mun. Code, § 13.01-H.)

"A Zoning Administrator may impose additional conditions or require corrective measures to be taken if he or she finds, after actual observation or experience with drilling one or more of the wells in the district, that additional conditions are necessary to afford greater protection to surrounding property." (L.A. Mun. Code, § 13.01-E(2)(i); see also L.A. Mun. Code § 13.01-F ["In addition to the standard conditions applying to oil drilling districts, . . . the Zoning Administrator may impose other conditions in each district as deemed necessary and proper"].) In addition, the Director of DCP may "modify or remove conditions" in order to abate a public nuisance, protect the "health, peace, or safety of persons residing or working on the premises or in the

surrounding area," protect "nearby uses" from "[a]dverse[ ] impact[ ]," or enforce existing regulations, ordinances, statutes, or previously approved conditions. (L.A. Mun. Code, § 12.27.1.)[14]

The City Code does not specifically address requests to modify previously approved conditions. Memoranda 94 and 94A—which Memorandum 133 expressly supersedes—allowed oil production companies with existing permits to seek modification of existing conditions through a change of use plan approval process similar to that described in section 12.24 of the City Code ("Conditional Use Permits and Other Similar Quasi-Judicial Approvals"). City Code section 12.24-M—which Memorandum 133 refers to and which corresponds to former section 12.24-G, which was referenced in Memorandum 94A—provides that a permittee may request to alter an existing, permitted use by submitting plans to the Zoning Administrator. (L.A. Mun. Code, § 12.24-M(1).) The Zoning Administrator may deny the request if he or she "finds that the use does not conform to the purpose and intent of the findings required for a conditional use under this section, and may specify the conditions under which the plans may be approved." (L.A. Mun. Code, § 12.24-M(1).) At least as of May 7, 2012, a conditional use approval required a finding that the project would "not adversely affect . . . adjacent properties,

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[14] Either the trial court or this court has formally taken judicial notice, at the City's request, of the City Code and Charter sections referred to in our opinion save City Code section 12.27.1. One of CIPA's declarants referred to that provision in her declaration, but neither CIPA nor any other party requested judicial notice of it. City Code section 12.27.1, like other provisions of the City Code, is a proper subject of judicial notice and we so notice it. (Evid. Code, §§ 452, subd. (b), 459.)

the surrounding neighborhood, or the public health, welfare, and safety . . . ." (L.A. Mun. Code, § 12.24-E.) Permittees may appeal plan approval decisions. (L.A. Mun. Code, § 12.24-M(2).)

3. Analysis of CIPA's property rights claims

CIPA does not dispute the City's general authority to approve oil drilling operations is discretionary. Nor does CIPA dispute that the Office of Zoning Administration may issue rules relating to permit application requirements—as it did when it issued Memorandum 133. But CIPA contends the memorandum implicates its members' property rights because the City's implementation of different procedures in the past—in particular, with respect to requests to re-drill existing wells and to modify existing conditions—effectively cabined its future discretion when reviewing similar requests. CIPA also contends Memorandum 133 violates its members' property rights by potentially nullifying mandatory modification processes specified in existing permits. Both arguments are unconvincing, as we now explain.

To establish the City restricted its discretion so as to entitle CIPA members to a continuation of previous practices, CIPA must show the City enacted a rule or regulation that (a) set forth conditions under which the benefit at issue was required to be granted or (b) identified the only conditions under which the benefit could be denied. (*Brown*, *supra*, 102 Cal.App.4th at p. 170.) CIPA falls short of making either showing. CIPA points to no City rule or regulation that imposes "particularized standards or criteria that significantly constrain" (*id.* at pp. 169-170) the City's discretion over applications to re-drill, deepen, or convert existing wells. Nor does CIPA convincingly argue Memoranda 94 and 94A conferred a legitimate expectation that the City would

limit itself to following the processes for modification review described in those documents. Memoranda 94 and 94A both acknowledge the City's authority to require applicants for modification to submit a full application for determination of conditions and neither "contains mandatory language" (*Allen*, *supra*, 911 F.2d at p. 370) restricting the City's discretion to impose a different procedure. Thus, CIPA cannot show a protected property right in the continuation of previous City practices.[15]

The interests of CIPA members in continuing to operate approved drilling operations—as permitted—may not be revoked without due process. (See, e.g., *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 784, 797-798; L.A.

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[15] CIPA invokes *Anchor*, *supra*, 205 Cal.App.4th 232 to support its claim that City practices prior to Memorandum 133 gave CIPA members a legitimate expectation those practices would continue. In *Anchor*, the appeals court confirmed a long-established holding that a tenant of government-subsidized housing may have a protected property interest in the renewal of his or her subsidized lease. (*Id.* at pp. 245-247.) *Anchor* is inapposite because it involved a confluence of factors not present here—the "substantial personal right" of affordable housing, government policy regarding low-income housing, the low-income tenant's reliance on subsidies provided as part of that policy, and the existence of state and federal laws prohibiting the eviction of subsidized tenants without good cause. (*Id.* at pp. 240-241, 245.) By contrast, government policies and legislation do not similarly promote and protect oil drilling operations. Thus, CIPA does not show it had more than a "'unilateral expectation'" (*id.* at p. 245, citations omitted) the City would continue to abide by past practices.

Mun. Code, § 12.24-L [authorizing the continuation of existing, permitted conditional uses].) But requiring more comprehensive environmental review of *future* drilling applications does not serve to revoke *existing* permits. (Cf. *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338 ["A city cannot unfairly discriminate against a particular parcel of land," but if a land use regulation "has been applied fairly and impartially . . . . the mere fact that some hardship is experienced is not material, since '[e]very exercise of the police power is apt to affect adversely the property interest of somebody'"].) CIPA submitted multiple declarations attesting Memorandum 133 will increase the burdens associated with modifying existing operations. But absent the establishment of a legitimate property right to such modification—i.e., a right to operate in a manner different than what was previously permitted—it is not enough to show that Memorandum 133 will increase costs.[16] The imposition of additional burdens does not itself create protected property rights where none otherwise exist.[17]

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[16] The City objected to multiple assertions in CIPA's declarations, and it contends on appeal that the trial court abused its discretion in overruling the vast majority of its objections. The City also contends the trial court abused its discretion when it refused to consider a declaration submitted by the City with its reply. We need not consider the City's claims of error because we conclude CIPA has not shown a probability of prevailing even accepting the trial court's evidentiary rulings as correct.

[17] CIPA declarant Zylstra asserted Memorandum 133 had already harmed his company because after issuing that directive, the City instituted a "'full site review'" of a company site to

CIPA is correct that Memorandum 133 potentially alters the terms of some existing permits rather than only future permits—specifically, those existing permits that require the City to follow a modification-review process inconsistent with Memorandum 133. Two of CIPA's declarants assert their companies possess such permits (although the declarants do not quote the relevant language from the permits or include the underlying documents). When confronted with such a permit, the Zoning Administrator under Memorandum 133 is to "consider whether a Plan Approval process [should] be initiated by the City to revise any conditions to protect the public health, safety and welfare, including any condition establishing a process inconsistent with the purposes of [Memorandum 133]." But because the City already (i.e., prior to Memorandum 133) had the authority to alter an existing permit condition in order to protect public health, safety, or welfare, CIPA cannot establish that Memorandum 133 infringes property rights under existing permits. (*Oasis*, *supra*, 51 Cal.4th at p. 820 [plaintiff does not show probability of prevailing if evidence in support of the anti-SLAPP movant defeats the plaintiff's evidence """as a matter of law"""].)

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confirm it was operating in "'compliance with the increased health, safety and environmental requirement[s] of . . . [Memorandum 133]." Zylstra's assertions do not establish a protected property interest. CIPA provides no evidence—from Zylstra or otherwise—that the City was prohibited from conducting site reviews prior to Memorandum 133, nor does it provide any evidence the site review Zylstra describes resulted in any injury.

As we previously observed, City Code section 12.27.1 allows the DCP to modify, discontinue, or revoke previously approved conditions—subject to notice to the permittee and a public hearing—if those conditions "jeopardize[ ] or adversely affect[ ] the public health, peace, or safety of persons residing or working on the premises or in the surrounding area . . . ." (L.A. Mun. Code, § 12.27.1; see also L.A. Mun. Code, §§ 12.24-E [conditional use approvals—which include change of use plan approvals—subject to consideration of "public health, welfare, and safety"], 13.01-E(2)(i) [allowing Zoning Administrators to "impose additional conditions or require corrective measures" if "necessary to afford greater protection to surrounding property"].) A close look at Memorandum 133 reveals it was designed to operate harmoniously with other City Code provisions. Memorandum 133 empowers Zoning Administrators to consider whether a Plan Approval process should be initiated only if necessary "to protect the public health, safety and welfare"—language that tracks the scope of authority provided in City Code sections 12.24-E and 12.27.1. In other words, the authority that Memorandum 133 explicitly confers upon the City with respect to modifications of previously approved conditions is authority that has existed all along. Nothing in Memorandum 133 indicates that the notice and hearing protections set forth in City Code section 12.27.1 would not apply before the City decided to modify, discontinue, or revoke a previously approved condition in an existing permit.[18]

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[18] Indeed, the City represents CIPA members will receive notice, an opportunity to be heard, and the right to appeal any determination made in the event a plan approval process is initiated pursuant to Memorandum 133.

Because Memorandum 133 does not expand the City's discretionary authority to make decisions about drilling, re-drilling, or modification of existing conditions, CIPA cannot show the measure implicates any protected property rights of its members. Without such an impact, CIPA has no probability of prevailing on its claim that due process requires voiding the settlement between the City and Nonprofits and compelling further litigation of Nonprofits' case to a termination on the merits.

DISPOSITION

The orders denying the City's and Nonprofits' section 425.16 special motions to strike are reversed. The matter is remanded to the trial court for entry of orders granting both anti-SLAPP motions and for further proceedings consistent with this opinion. The City and Nonprofits shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

KIM, J.

JASKOL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.